



Legal Alert | April 27, 2021

The Business Laws (Amendment) (No.2) Act, 2021 and the Employment (Amendment) Act, 2021

Introduction

The Business Laws (Amendment) (No.2) Act (“the Act”) was assented to by the President and commenced on March 30, 2021. The Act amends various statutes to facilitate the ease of doing business in Kenya. Below is a summary of the salient changes brought about by the Act.

Execution of Contracts

The Law of Contract Act (Chapter 23, Laws of Kenya) is amended to eliminate the requirement of a company seal in execution of contracts relating to land. Documents are now validly executed by companies when disposing interests in land if signed on behalf of the company by two authorised signatories or by a director of the company in the presence of a witness who attests to the signature. This amendment is in line with amendments to the Companies Act (No. 17 of 2015, Laws of Kenya) on the scrapping of the requirement of affixing a company seal in the execution of company documents.

Payment of training levy

The Industrial Training Act (Chapter 23, Laws of Kenya) is amended to provide a deadline for the remission of the training levy payable by employers. The levy is to be remitted not later than the ninth day of the month after the end of the financial year of a business. The purpose of this levy is to assist the National Industrial Training Authority, collaborating with employers, to professionally train employees in different sectors.

Exemption of Stamp Duty

The Stamp Duty Act (Chapter 480, Laws of Kenya) now exempts contracts chargeable as conveyances of sale from payment of stamp duty. Previously, one would be required to pay stamp duty of Kenya Shillings One Hundred (KES 100.00).

Payroll Deductions

The National Hospital Insurance Fund Act (No. 9 of 1998, Laws of Kenya) and the National Social Security Fund Act (No. 45 of 2013, Laws of Kenya) are both amended to require employers to remit statutory contributions to both funds on the ninth of each month, aimed at harmonizing payroll deductions and easing remittance for employers.

Virtual and hybrid meetings

The Companies Act is amended to allow companies to hold virtual and hybrid meetings. Hybrid meetings occur where some members attend virtually while others are physically present, while virtual meetings occur where all members join and participate in the meeting through electronic means, such as video conference. This amendment recognises the effect of the pandemic on traditional face-to-face meetings and promoting the use of technology in such meetings as a way to communicate and keep doing business

Insolvency

The Insolvency Act requires a company with minimum net assets of KES 500,000.00, having a floating charge over its property, and in respect of which a liquidator, provisional liquidator or administrator (either being an “insolvency officer”) has been appointed, to avail 20% of its net assets for satisfaction of unsecured debts. Previously, only an insolvency officer could ask the court to exempt the company from this provision and only where the cost of such distribution outweighed its benefits. The Act now allows a secured creditor to apply for the exemption if it can show this unfairly harms its interests.

Second, the Insolvency Act is amended to replace the role of a provisional supervisor in relation to moratoriums with a monitor. The monitor reviews the proposed voluntary arrangement for which the moratorium is being sought.

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Based on the assessment, the monitor confirms to the insolvency court whether the proposed voluntary arrangement is worth presenting for approval to the creditors and members of the company. If the moratorium is issued, the monitor must notify those creditors who had applied for liquidation when the moratorium comes into effect and when it ends.

Third, the amendments introduce a 'pre-insolvency moratorium' for financially distressed companies. This will be useful in protecting otherwise profitable companies going through momentary cash flow issues from sliding into insolvency. However, the amendments are unclear on how financial distress will be assessed which on implementation may present interpretation issues in court. We expect either the Legislature or the Judiciary will provide clarity on this going forward.

Fourth, the duration of moratoriums has been amended. A moratorium may now either at the end of the day on which a meeting of the company or its creditors is held to consider a voluntary arrangement (whichever is held later) or after 30 days from the day it was given. This amendment will likely be welcomed by creditors as it provides a definite timeline for creditors to know whether there is an approved voluntary arrangement, or to proceed with liquidation proceedings. Previously, a moratorium would end only after the company and creditors had held meetings and approved the voluntary arrangement.

Lastly, a moratorium can now only be extended by the court on application by the directors. The extension will be granted if the directors demonstrate that the extension is necessary and has the probability of achieving the initial objectives of the moratorium. Previously, meetings of the company and its creditors could approve an extension with or without conditions.

Small Claims Court

The Small Claims Court Act has been amended to require the court to resolve all claims pending before it within 60 days. This is meant to expedite dispute resolution and reduce the Judiciary backlog.

The Employment (Amendment) Act, 2021

The Employment (Amendment) Act commenced on April 15, 2021, and introduces pre-adoptive leave. Employees who are adopting are now entitled to 1 month of pre-adoptive leave with full pay. The employee must notify their employer at least 14 days before they get custody of the child. The notification should be accompanied by the exit certificate and a custody agreement. An exit certificate is written approval by a registered adoption society to a prospective adoptive parent to take the child into their custody. It will serve as proof to an employer that an employee is adopting.

The Employment Act now extends protections to those taking pre-adoptive leave, including the right to return to the job held immediately prior to the pre-adoptive leave or to a reasonably suitable job with terms and conditions no favourable than the employee would have, had they not taken pre-adoptive leave, and protection from forfeiture of annual leave on account of taking pre-adoptive leave.

Conclusion

The amendments are in line with other policy moves aimed at easing doing business. Particularly welcome are the changes to insolvency and employment laws to meet the evolving needs of businesses and employees.

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